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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff

v.

No. C90-0695-L(J)

BEN HARDY, et al.
Defendants

COMMONWEALTH OF KENTUCKY, etc.,
Plaintiff

v.

No. C90-0792-L(J)

BEN HARDY, et al.
Defendants

COMPTROLLER
AUG 13 10 45 AM '93
EPA/REGION IV

MEMORANDUM

Before the court are cross motions for summary judgment between Dow Corning Corporation and Waste Management of Kentucky, Inc. (WMKy) concerning an alleged contract for indemnification for damages arising from WMKy's hauling and disposal of Dow Corning's waste at the Lee's Lane cleanup site. For the reasons below, both motions will be denied. Also before the court is a motion by the United States to enter the original consent decree with the twenty-three settling defendants and a consent decree between the United States and Ford Motor Company and Dow Corning Corporation. The court has reviewed the consent decree and the motion will be granted.


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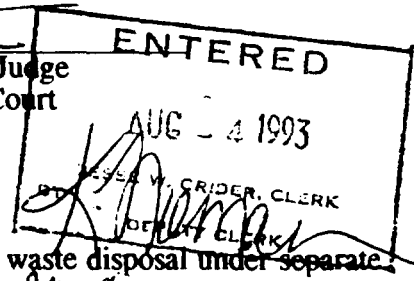
A daunting volume of printed material has been devoted to the issue of express contractual indemnity by the parties. The court will not attempt to match their prolixity. Although this would seem to be a relatively straightforward issue of contract formation and interpretation, the analysis is obscured. Because there are disputed facts present, summary judgment is inappropriate for either party.

The parties agree that WMKy hauled waste from Dow Corning's Elizabethtown plant to the Lee's Lane landfill site. The waste was of two kinds: drummed waste and waste contained in an "Anchorpac" waste compacting device leased to Dow Corning by WMKy. However neither party can produce a written instrument which purports to be a complete contract concerning either of the disposal agreements*. Dow Corning has provided a patchwork of letters of negotiation, severed indemnity agreements, purchasing orders and testimony concerning missing documents to supply the terms of the agreements. WMKy disputes Dow Corning's collective reading of this evidence. Without attempting to recount the specific details of the dispute, the court finds that ambiguities exist regarding the terms of the agreements, including the effective dates of the indemnity provisions. Dow Corning has not presented sufficient evidence to justify an award of summary judgment on the issue of complete indemnity as a matter of law.

There is sufficient disputed evidence to require a trier of fact to decide the disputed matters regarding the contracts. Therefore, WMKy's motion for summary judgment will also be denied. It is unnecessary to decide at this point whether Dow Corning's liability is entirely derivative of its agreements with WMKy.

An appropriate order has been entered this 27th day of July, 1993.


Edward H. Johnstone, Judge
United States District Court



8/3/93
* The parties also engaged in at least two "trial periods" of waste disposal under separate agreement. This agreement is also incompletely documented.

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ORDER

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED:

1. That the renewed motion of the United States to enter the Consent Decree with the twenty-three original settling defendants is GRANTED.
2. That the motion of the United States to enter the Consent Decree with Ford Motor Company and Dow Corning Corporation is GRANTED.
3. That the motion of the United States to vacate the September 9, 1992 Order and Memorandum Opinion is GRANTED in part. Those portions of the Order and Memorandum Opinion which relate to the court's rejection of the Consent Decree on the grounds of substantive fairness are VACATED.

4. The motion for summary judgment by Dow Corning Corporation is DENIED.

5. The motion of Waste Management of Kentucky, Inc. for summary judgment is DENIED.

IT IS SO ORDERED this 27th day of July, 1993.



Edward H. Johnstone, Judge
United States District Court

Copies to counsel

